

TITLE 85
EXEMPT LEGISLATIVE RULE
WORKERS' COMPENSATION RULES OF THE
WEST VIRGINIA INSURANCE COMMISSIONER

SERIES 9
WORKERS' COMPENSATION UNINSURED EMPLOYERS' FUND

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§85-9-1. General.

1.1. Scope. -- These rules shall govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

1.2. Authority. -- W. Va. Code §§23-2C-5(c)(2); 23-2C-22; 33-2-10(b); and 33-2-20(a). Pursuant to W. Va. Code §§23-2C-5(c)(2) and 33-2-10(b), rules adopted by the Industrial Council and the Insurance Commissioner as related to workers' compensation under chapter twenty-three of the West Virginia Code are not subject to legislative approval as would otherwise be required under W. Va. Code, §29A-3-1 et seq. Public notice requirements of that chapter and article, however, must be followed.

1.3. Filing Date. -- November 17, 2006.

1.4. Effective Date. -- December 17, 2006.

§85-9-2. Purpose.

The purpose of this rule is to establish a procedure and process to govern the administration of the Workers' Compensation Uninsured Employers' Fund pursuant to W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

§85-9-3. Definitions.

As used in this exempt legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

3.1. "Commissioner" means the Insurance Commissioner of West Virginia as provided in W. Va. Code §23-2-1, or any designated third-party administrator of the Insurance Commissioner.

3.2. "Industrial Council" means the Industrial Council created pursuant to W. Va. Code §23-2C-5.

3.3. "Private carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

3.4. "Fund" is the Workers' Compensation Uninsured Employers' Fund, as defined and established in W. Va. Code §§23-2C-2(o); 23-2C-7(a); and 23-2C-8.

3.5 "Workers' compensation coverage," as the term is used in this rule, means mandatory workers' compensation coverage pursuant to W. Va. Code §23-2C-1, et seq.

§85-9-4. Application for Benefits from the Fund.

4.1. If an individual believes that he or she may be entitled to benefits under the Fund, then he or she shall complete an application for benefits from the Fund on a form created by the Commissioner. The Commissioner reserves the right to change the Fund application from time to time as deemed necessary. Completion of the application for benefits is an absolute prerequisite for any entitlement to benefits from the Fund.

4.2. Upon receipt of an application for benefits, the Commissioner shall send a letter to the employer named in the application which notifies the employer that one of its employees has made a claim against the Fund.

4.3. Within five (5) business days of receiving an application for benefits, the Commissioner shall determine whether: (1) the employer named in the application was required to carry workers' compensation coverage on the date of the injury or last exposure; and (2) if the employer named in the application was required to carry workers' compensation coverage on the date of the injury or last exposure, whether the employer named in the application was carrying workers' compensation coverage on the date of injury or date of last exposure. If the Commissioner needs additional time to make this determination, the Commissioner shall be granted up to an additional thirty (30) calendar days to make the determination. The Commissioner shall also send a letter to the claimant, copied to the employer, informing them that the determination cannot be made within five (5) business days, the reason(s) why it cannot be made and that the decision will be made within the next thirty (30) calendar days.

a. If the Commissioner determines that: (1) the employer named in the application was carrying workers' compensation coverage on the date of injury or date of last exposure; or (2) the employer named in the application was not required to carry workers' compensation coverage on the date of injury or date of last exposure, then the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this determination, and that coverage for the claim through the Fund is therefore denied. Additionally, in the case that the Commissioner determines that the employer named in the application was carrying workers' compensation coverage on the date of injury or date of last exposure, the letter described in this subdivision shall also be copied to the insurance carrier.

b. If the Commissioner determines that: (1) the employer named in the application was required to carry workers' compensation coverage on the date of injury or date of last exposure; and (2) the employer named in the application was not carrying workers' compensation coverage on the date of injury or date of last exposure, then the Commissioner shall send the claimant a letter, copied to the employer, informing the claimant of this

determination, and that the claim will be accepted into the Fund: *Provided*, That the letter accepting the claim is not a compensability ruling, but rather is only an initial determination that the claim is chargeable to the Fund, if in fact the claimant is ultimately found by the claims adjuster to be otherwise entitled to benefits under the law. The Commissioner shall then administer the claim or forward the claim to its designated third-party administrator for further administration of the claim consistent with the provisions of chapter twenty-three of the West Virginia Code and the rules promulgated thereunder.

4.4. If, after rendering a determination as described in subdivisions a and b, subsection 4.3 of this section, the Commissioner receives evidence to indicate that the determination was erroneous, the Commissioner reserves the right to enter a corrective determination remedying the previous erroneous determination.

4.5.a. Any decision rendered by the Commissioner under subdivision a or b of subsection 4.3 or subsection 4.4 of this section may be contested by an aggrieved party by filing a protest and request for hearing within thirty (30) calendar days of receiving the determination and in a manner otherwise consistent with the protest instructions contained in the decision. The Insurance Commissioner will then schedule a hearing on the matter before a hearing examiner to take place within fifteen (15) days of the receipt of the protest: *Provided*, That the only issues that may be argued by any party contesting any such determination are: (1) whether the employer named in the application was required to carry workers' compensation coverage on the date of injury or date of last exposure; and (2) whether the employer named in the application was in fact carrying workers' compensation coverage on the date of injury or date of last exposure. Hearings under this subdivision shall otherwise proceed pursuant to the provisions of W. Va. Code St. R. § 85-7-4 through 85-7-13. All appeals from the final order or decision of the commissioner following the hearing shall be taken pursuant to W. Va. Code, § 29A-5-4.

§85-9-5. Irrevocable Assignment of Subrogation Rights.

5.1. Pursuant to W. Va. Code §23-2C-8(b)(1)(C), as a condition of receiving benefits from the Fund, a claimant under the Fund irrevocably assigns his or her rights to recover money from a collateral source for the occurrence or exposure which resulted in the claimants' injury, including, but not limited to: (a) any benefits from other existing insurance policies, such as a later discovered workers' compensation policy providing coverage, or a disability insurance policy; and (b) any funds resulting from a settlement or jury verdict stemming from a cause of action under statutory or common law against a third-party who has liability for the occurrence or exposure which resulted in the claimant's occupational injury or disease: *Provided*, That this irrevocable assignment of rights of recovery is only to the extent of the actual monetary benefits received by the claimant from the fund: *Provided further*, That nothing in this subsection shall be construed to prevent a claimant from pursuing a claim on his or her own against a collateral source for the occurrence or exposure. The subrogation language contained in the application for benefits from the Fund, which is signed by the claimant, is deemed to constitute the irrevocable assignment from the claimant to the Commissioner of a right to be subrogated to the rights of the claimant as contemplated by this subsection and W. Va. Code §23-2C-8(b)(1)(C).

5.2. Pursuant to the irrevocable assignment of subrogation rights as contemplated in

subsection 5.1 of this section and W. Va. Code §23-2C-8(b)(1)(C), the Commissioner shall have discretion to pursue subrogation directly from any collateral source with liability, by contacting the collateral source and demanding the funds for which the source is liable, and bringing a civil action in the name of the claimant against the liable source if necessary; or seeking subrogation from the claimant of any funds the claimant has successfully recovered from any collateral source; or any combination thereof: *Provided*, That the Commissioner shall only be permitted to seek collateral source funding as described in this section up to the amount of benefits paid from the Fund, including all medical and indemnity benefits.

§85-9-6. Employer Liability.

6.1. Pursuant to W. Va. Code §23-2C-8, an employer of claimant(s) who receive benefits from the Fund are liable to the Fund for all expenditures from the Fund on behalf of their injured employee(s), including, but not limited to:

- a. All benefits, including all medical and indemnity payments, made from the Fund;
- b. All claims administration costs related to the administration of claim(s) against the Fund;
- c. All attorney fees related to defense of claim(s) made against the Fund; and
- d. Interest on the above expenditures, as calculated under W. Va. Code §23-2C-8(b)(8).

6.2. An employer shall remain on the Commission Default List or Private Carrier Default List, whichever is applicable, as defined in 85CSR11, until it pays all of its liability to the Fund, enters into a full and final settlement with the Commissioner for its liability to the Fund or enters into a repayment agreement with the Commissioner for its liability to the Fund. As such, the employer will be subject to all of the sanctions associated with being on the Default List, including, but not limited to:

- a. Not being permitted to obtain or renew mandatory workers' compensation coverage;
- b. Having a posting placed on the employer's front door informing its employees that the employer is uninsured and therefore may be sued by its employees for work related injuries;
- c. A penalty of up to \$10,000, pursuant to W. Va. Code §23-2C-8(b)(10); and
- d. Being subject to an action in the Circuit Court of Kanawha County to enjoin the employer from continuing business operations.

6.3. If an employer incurs liability to the Fund after being removed from the

Commission Default List or Private Carrier Default List, whichever is applicable, and the employer fails to remit payment for such liability to the Fund on a timely basis, as described in subsection 7.1 of this rule, the employer will be placed on the Default List until the liability is fully paid or otherwise resolved pursuant to section 7 of this rule.

§85-9-7. Methods for Determining and Collecting Employer Liabilities Owed to the Fund.

The Commissioner shall have discretion, on a case-by-case basis, based on what is considered to be in the best interests of the Fund, to utilize one or more of the following methods to determine and collect amounts owed to the Fund:

7.1. As benefit payments are made from the Fund, issue pay orders to liable employers ordering them to reimburse the fund, within a specific and reasonable amount of time, as selected by the Commissioner, for the amounts described in subsection 6.1 of this rule;

7.2. Enter into repayment agreements with employers to reimburse the Fund for the amounts described in subsection 6.1 of this rule, and then enter pay orders to employers as described in subsection 7.1 of this section;

7.3. Using generally accepted accounting and actuarial principles, reduce the estimated amount of a claim or claim(s) against the Fund, including all the amounts described in subsection 6.1 of this rule, to a present value reserve for the claim, and then deem the responsible employer to be liable for this amount. The Commissioner may then pursue this amount as a judgment against the employer, including filing a civil action in Circuit Court against the employer, seeking a judgment lien against the employer, and all other accepted methods of collection as set forth in article two, chapter twenty-three of the West Virginia Code and 85CSR11.

7.4. The Commissioner shall have discretion, if it is found to be in the best interests of the Fund, to enter into a full and final settlement with an employer for its liability to the Fund. Further, if it is found to be in the best interests of the Fund, the Commissioner shall have discretion to waive amounts owed to the Fund as part of a repayment agreement or a full and final settlement with the employer.

§85-9-8. Methods for Determining Assessments for the Fund.

8.1. If at any time the Commissioner determines, based on generally accepted accounting and actuarial principles, despite the collection of, or projected collection of, amounts owed to the Fund, that: (1) the Fund has incurred a deficit balance; or (2) it appears imminent that it will incur a deficit balance, then, in order to maintain the solvency of the Fund, the Commissioner may, pursuant to W. Va. Code §23-2C-8(a)(3), impose assessments against either private carriers, self-insured employers, or both, in the following manner:

a. Monthly or quarterly assessments against workers' compensation private carriers that reflect the relative hazard of the employments covered by the private carriers, results in an equitable distribution of costs among the private carriers and is based upon expected annual premiums to be received: Provided, this assessment may be collected by each private carrier

from its policy holders in the form of a policy surcharge, and private carriers will have no liability for the amounts of this assessment which are not paid by employers defaulting on their premium payments;

b. Monthly or quarterly assessments against self-insured employers that result in an equitable distribution of costs among the self-insured employers and is based upon expected annual expenditures for claims.

8.2. Prior to imposing the assessments described in this section, the Commissioner shall provide at least sixty (60) days notice to the entities being assessed. Notice shall be provided in writing to all entities being assessed and through other means deemed appropriate by the Commissioner.

§85-9-9. Severability.

If any provision of these rules or the application thereof to any person, party, or circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect the other provisions or application of these rules, and to this end the provisions of these rules are declared to be severable.